



**INDIANA COURT OF APPEALS  
CASE AT A GLANCE  
PURDUE UNIVERSITY KRANNERT CENTER FOR  
EXECUTIVE EDUCATION**

**ENVIRONMENTAL LAW**

**The Court of Appeals is asked to address four questions:**

- 1) Does the statute of limitations bar the action?**
- 2) Is Cooper Industries the corporate successor to Studebaker?**
- 3) Can the City of South Bend maintain its claims under the Environmental Legal Action statute?**
- 4) Are the City's tort claims barred by *caveat emptor*?**

*Cooper  
Industries  
LLC v. City  
of South  
Bend*

**Appeal  
from:**  
Marion  
Superior Court

The Honorable  
Michael D.  
Keele, Judge

**Oral  
Argument:**  
January 18,  
2006  
12:30 p.m. –  
1:30 p.m.  
30 minutes  
each side

**CASE SYNOPSIS**

**Facts and Procedural  
History**

Beginning in the 1850s, Studebaker Corporation, incorporated in Michigan, manufactured wagons and then automobiles in South Bend. Studebaker's facilities in South Bend ultimately covered 104 acres, including approximately 3.65 million square feet under roof. Studebaker became a diversified manufacturer of many types of industrial products in the 1950s and 1960s and continued to manufacture automobiles at its South Bend facilities until it discontinued manufacturing automobiles in December 1963, at which point Studebaker divested its automotive operations in South Bend.

In 1967, Studebaker combined with Worthington Corporation to form a new company, Studebaker-Worthington Inc. In 1979, McGraw-Edison Company acquired all outstanding shares of Studebaker-Worthington. In 2004,

McGraw-Edison merged into Cooper Industries, LLC.

Following Studebaker's divestiture of its automotive facilities in South Bend, the facilities were used for a variety of other operations. Subsequently, the City of South Bend and the South Bend Redevelopment Commission began acquiring Studebaker property for the purpose of redevelopment. After conducting various evaluations of the former Studebaker facilities, the City determined there were significant environmental releases from Studebaker's manufacturing operations still impacting the soil and groundwater at those facilities and surrounding areas.

In March 2003, the City filed this action against McGraw-Edison, which later merged into Cooper Industries, LLC, seeking to hold it liable as Studebaker's liability successor. The City seeks recovery of its costs under Indiana environmental statutes and common law tort theories.

*Cooper Industries LLC v. City of South Bend, Indiana***Case Synopsis (continued)**

Both sides moved for summary judgment. The trial court issued partial summary judgment, finding that as a matter of law Cooper Industries is the corporate successor to the liabilities of Studebaker. The trial court further found that the City can maintain its claims under the Environmental Legal Action statute and under Indiana tort law, and that all of the City's claims are timely as to any property purchased within six years of its filing the suit. Cooper now brings this interlocutory appeal.

**Parties' Arguments**

Cooper makes four arguments on appeal. Cooper first argues that the City's claims are barred by the statute of limitations. Cooper maintains the City's claims accrued when it first learned of the environmental conditions, more than six years prior to its purchase of the property. Cooper argues that the Environmental Legal Action statute does not resurrect the City's claims. The City argues that its claims are not time barred because the statute of limitations did not begin to run until it owned the property. It also argues the statute of limitations on its Environmental Legal Action claims did not begin to run until the effective date of the statute.

Second, Cooper argues that if the suit is timely, Cooper is not the corporate successor to Studebaker's liabilities. Cooper points to the documents of the transfer of Studebaker's assets to show the parties never intended an express assumption of liability. The City counters that the various transfer documents show Studebaker-Worthington

expressly assumed the liabilities of Studebaker. The City also argues that the combination of Studebaker and Worthington qualified as a de facto merger and Studebaker-Worthington was a "mere continuation" of its predecessor.

Third, Cooper argues that the City may not pursue a claim under the Indiana Environmental Legal Action statute because the statute states that an action may be brought by either the state or a private person, and the City is neither. The City asserts it is a "person" for purposes of the ELA and thus it can bring the claim.

Finally, Cooper argues the City's tort claims are barred under the doctrine of *caveat emptor*. Cooper asserts the City's negligence claim must fail because the City lacks the requisite legal relationship with Studebaker. Further, the City argues Studebaker could not have trespassed on its own land. With regard to the City's nuisance claims, Cooper makes two claims. First, Cooper asserts the City is no different than any other landowner and thus cannot sue in public nuisance. Second, Cooper asserts private nuisance claims only cover controversies between neighboring landowners. The City argues it has a valid cause of action for each of its tort claims.

Cooper asks that the summary judgment in favor of the City be reversed and that summary judgment be entered on Cooper's behalf.

## Case Synopsis (*continued*)

### GLOSSARY OF TERMS

**Tort:** A non-criminal breach of a legal duty one person owes to another that results in injury.

**Statute of Limitations:** The law limiting the maximum period within which one has to initiate legal proceedings for different classes of disputes. If the suit is not filed or claim made within that period, then the applicant loses his right.

**Caveat Emptor:** Doctrine which establishes the responsibility of the buyer to inspect and test the goods he is buying and places entire responsibility on the buyer for any defect in the product unless seller provides a warranty or the product was intended and marketed for a special purpose.

**Summary Judgment:** A procedural device to resolve a dispute without a trial when there is no issue as to the facts that would determine the outcome and one party is entitled to judgment as a matter of law.

**Motion:** A request that the Court make a ruling or issue an order.

**“Designated” Evidence:** Evidence submitted to the Court along with the pleadings for resolution of a motion for summary judgment.

**“Temporary Admission”:** In some places known as *pro hac vice* (“for this occasion”), the rule allowing an out-of-state attorney to argue a case before a court in Indiana. The appellant or appellee must file the appropriate paperwork with the Clerk of Courts.

**Interlocutory Appeal:** An appeal that occurs during the course of a trial, before the trial court reaches a decision. During the interlocutory appeal, the trial is placed on hold.

### Opinion in this case expected:

By late spring  
2007

**For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>**

**Or contact:**

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## PANEL OF JUDGES

### **Hon. James S. Kirsch (Marion County), Presiding**

- Judge of the Court of Appeals since March 1994
- Chief Judge of the Court since March 2004

**James S. Kirsch** was appointed to the Court of Appeals in March 1994 and was elected Chief Judge in March 2004. A native of Indianapolis, Judge Kirsch is a graduate of the Indiana University School of Law at Indianapolis (J. D., cum laude, 1974) and Butler University (B.A. with honors, 1968). He served as Judge of the Marion Superior Court from 1988 to 1994 and as presiding judge of the court in 1992. From 1974 to 1988, he practiced law with the firm of Kroger, Gardis & Regas in Indianapolis in the areas of commercial and business litigation and served as managing partner of the firm.

Since 1990, Chief Judge Kirsch has held an appointment as Visiting Professor of Law and Management at the Krannert Graduate School of Management at Purdue University. Judge Kirsch is a past-president of the Indianapolis Bar Association and of the Indianapolis Bar Foundation and a former member of the Board of Visitors of the Indiana University School of Law-Indianapolis.

Judge Kirsch is a past-president of the United Way/Community Service Council Board of Directors and a current or former member of the Board of Directors of the United Way of Central Indiana, the Board of Associates of Rose Hulman Institute of Technology, and of the Boards of Directors of the Goodwill Industries Foundation of Central Indiana, Community Centers of Indianapolis, the Indianapolis Urban League, the Legal Aid Society of Indianapolis, and the Stanley K. Lacy Leadership Association.

Judge Kirsch is also a Fellow of the Indiana State Bar Foundation and of the Indianapolis Bar Foundation. He is a frequent speaker and lecturer and has served on the faculty of more than 200 continuing legal education programs. He has been named a Sagamore of the Wabash by four different governors.

Judge Kirsch and his wife Jan have two children, Adam, a senior at Wabash College, and Alexandra, a senior at Cathedral High School. Chief Judge Kirsch was retained on the Court in 1996 and 2006.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began just prior to the Court's centennial in 2001.

**Today's oral argument is the 174th case the Court of Appeals has heard "on the road" since early 2000.**

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

## PANEL OF JUDGES

### **Hon. Margret G. Robb (Tippecanoe County)**

- Judge of the Court of Appeals since July 1998

**Margret G. Robb** was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis. Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender.

Judge Robb chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar

Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YMCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue. Their son, Douglas, a graduate of the U.S.N.A., recently embarked on his first deployment.

The 15 judges on the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



## PANEL OF JUDGES

### **Hon. Paul D. Mathias** **(Allen County)**

- Judge of the Court of Appeals since March 2000

**Paul D. Mathias** was appointed to the Court by Governor Frank O'Bannon in March, 2000. Judge Mathias is a fifth generation Hoosier and grew up in Fort Wayne. He graduated from Harvard University, *cum laude*, in 1976 and from Indiana University School of Law – Bloomington in 1979, where he was a member of the law school's Sherman Minton Moot Court Team and *Order of Barrister*.

Judge Mathias practiced law for six years in Fort Wayne, concentrating in construction law, personal injury and appellate practice. In 1985, he was appointed Referee of the Allen County Small Claims Court, where he

served until his appointment as Judge of the Allen Superior Court – Civil Division by Governor Evan Bayh in 1989.

Judge Mathias served as an officer of the Indiana Judges Association from 1993 to 1999 and as its president from 1997 to 1999. He received the Centennial Service Award from the Indiana State Bar Association in 1996, and a Sagamore of the Wabash Award from two governors.

Judge Mathias, who was retained on the Court of Appeals by election in 2002, is married and has two sons.

## ATTORNEYS FOR THE PARTIES

### **For Appellant, Cooper Industries LLC:**

**Dale E. Stephenson**  
**Squire Sanders &**  
**Dempsey, LLP**  
**Cleveland, Ohio**

**Dale Stephenson** is experienced in all aspects of US environmental law including state and federal litigation, corporate and governmental counseling, administrative law practice before state and federal agencies, insurance coverage for environmental liabilities, and the general development and enhancement of corporate environmental, health and safety programs. He has particular expertise in the chemical regulatory area including laws governing production and manufacturing operations as well as treatment, storage and disposal facilities.

Mr. Stephenson's litigation experience includes a variety of matters involving air, water, hazardous substances, noise and general environmental impacts. He is experienced in negotiating consent decrees, permits and variances and corporate counseling on compliance with laws and regulations governing air pollution sources, wastewater discharges and the production, treatment, storage, transportation and disposal of chemicals and hazardous wastes.

For the past decade, Mr. Stephenson has been trial and appellate counsel in the landmark environmental case *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). Following a precedent-setting U.S. Supreme Court victory on the fundamental issue of whether Superfund contribution claims can be brought by private parties who have not been subject to governmental enforcement or other legal compulsion, Mr. Stephenson continues to represent Cooper with respect to the issues remanded for further consideration by the lower courts.

In the international setting, Mr. Stephenson serves as the managing partner for Squire Sanders' Middle East practice. He has a wide range of experience in the area of international institutional development and regulatory matters, with particular expertise in the field of environmental law. He has represented foreign governments, including the United Arab Emirates and the Republic of Trinidad and Tobago, in helping to create new federal environmental authorities and drafting comprehensive national environmental laws and regulations. He has also assisted in the training of governmental officials and other interested parties with respect to institutional and regulatory development issues.

Mr. Stephenson coordinates activities with Squire Sanders' Middle East affiliate, the Al Rowaished & Al Assaf Law Firm in Riyadh, and lived in Saudi Arabia for two years. Recent Middle East projects include the creation of Bank Al Bilad, a US\$1 billion capitalization project involving a 50 percent initial public offering (IPO) that attracted the highest investor participation ever experienced in Saudi Arabia (more than half of the entire local population). In the public sector, Mr. Stephenson and other Riyadh office lawyers have served as counsel to the Saudi Arabian government designing the legal structure and systems for 178 new municipal councils and the first public elections in that country. They also represent the government of Bahrain in reforming its labor and immigration laws, as well as the successful bidding consortium that was awarded one of the telecommunications data licenses in Saudi Arabia. Other projects in the Middle East region include a variety of corporate, regulatory and dispute resolution matters.

Mr. Stephenson is a member of the American Bar Association's Section of Environment, Energy and Resources and its Section of International Law. He also has been a guest lecturer and panelist at numerous seminars and programs involving environmental and international law.

## ATTORNEYS FOR THE PARTIES

### **For Appellee, City of South Bend, :** **George Plews** **Plews Shadley Racher & Braun LLP** **Indianapolis**

**George M. Plews** is a partner in the Indianapolis law firm of Plews Shadley Racher & Braun LLP. He received his A.B. degree, *magna cum laude*, in 1974 from the Woodrow Wilson School of Public and International Affairs, Princeton University, his Honours B.A. (Politics, Philosophy and Economics) and M.A. degrees in 1976 and 1981, respectively, from Worcester College, Oxford University, and his J.D., *cum laude*, in 1979 from Harvard Law School. He is admitted to the bar in the State of Indiana (1979), the United States Court of Appeals for the Seventh Circuit (1981) and the United States Supreme Court (1991). Prior to founding Plews Shadley Racher & Braun in 1988, he practiced at Baker & Daniels in Indianapolis from 1979 to 1988 (partner 1986-1988).

The focus of his work is in the areas of environmental law, insurance coverage and other litigation. His environmental law practice spans a range of matters including the prosecution and defense of claims involving state and federal environmental acts and toxic torts, as well as permitting, zoning and governmental enforcement matters. His insurance coverage practice involves the representation of policyholders, particularly in actions with respect to claims concerning environmental liabilities.

Mr. Plews has authored numerous articles, including the two most recent surveys in the *Indiana Law Review* of environmental law developments. He is frequent speaker before legal, trade association & business groups. Significant appellate cases in which he was lead counsel include *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996) (ambiguity of pollution exclusions in CGL insurance policies), *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001) (multi-insurer allocation issues and inapplicability of "owned property" exclusion), *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705 (Ind. App. 2004) (allocation issues and subjective expectation or intent to cause environmental damage), *Travelers Indem. Co. v. Summit Corp. of Am*, 715 N.E.2d 926 (Ind. Ct. App. 1999) (choice of law and "personal injury" coverage for environmental liabilities), *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285 (Ind. Ct. App. 1997) (choice of law and ambiguity of "suit" and "damages" provisions in CGL policies); *Ind. Dep't of Nat'l Res. v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993) (establishing the role of administrative law judge as trier of fact), *Ind. Dep't of Env't'l Mgt. v. Chem. Waste Mgt. of Ind., Inc.*, 604 N.E.2d 1199 (Ind. Ct. App. 1992) (retroactivity of hazardous waste disposal permitting statute).

Mr. Plews serves on the board of directors of the St. Richard's School Foundation (president), Trustee Leadership Development, Inc. (treasurer), the Indiana Inter-church Center, the Indianapolis Bar Foundation (executive committee) and is Chancellor of the Episcopal Diocese of Indianapolis.

## AMICUS BRIEFS

*A person who is not a party to a lawsuit may file a brief of amicus curiae, with permission of the Court, if he or she has a strong interest in the subject matter.*

- There are no amicus filings in this case.